

Updated CEQ Guidance for Analysis of GHG Emissions Sidesteps Key Legal Issues

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In the latest effort by the Biden administration to promote consideration of climate and environmental justice impacts in federal decision-making, the White House Council on Environmental Quality (CEQ) recently issued interim [guidance](#) for federal agencies analyzing greenhouse gas emissions (GHG) and climate change under the National Environmental Policy Act (NEPA).^[1] Under the new guidance, which is similar to previous guidance that had been withdrawn under the Trump administration, NEPA review documents generally will be expected to quantify GHG emissions caused by federal actions, discuss the resulting climate impacts, and incorporate environmental justice considerations. While the guidance recommends methods for conducting the necessary technical analysis, it sidesteps key legal issues surrounding climate change analysis under NEPA, leaving federal agencies—and project proponents seeking federal approvals or funding—with difficult questions to resolve.

The interim guidance effectively replaces and updates the [final guidance](#) CEQ issued in 2016 under the Obama administration.^[2] The Trump administration withdrew that guidance in 2017 and, in 2019, published a brief [draft guidance](#) document advising federal agencies to quantify GHG emissions if “substantial” and if doing so was “practicable” rather than “overly speculative.” The Biden administration rescinded the 2019 draft guidance in 2021.

The new guidance generally echoes the recommendations embodied in the 2016 final guidance, including that agencies should:

- quantify direct and indirect GHG emissions resulting from their actions using suitable quantification tools;
- use the projected GHG emissions to assess potential climate impacts, both short-term and long-term, associated with the proposed action and alternatives;
- consider the potential effects of climate change on the proposed action and alternatives, including potential measures to enhance resilience and adaptation;
- consider reasonable alternatives and available mitigation measures that avoid, minimize, or

compensate for GHG emissions and climate change effects; and

- incorporate environmental justice considerations, including whether the proposed action may contribute to disproportionate effects on communities with environmental justice concerns.

While these principles are familiar to NEPA practitioners, the guidance also incorporates some new elements, including an explicit recommendation that NEPA documents include the social cost of GHG (SC-GHG) estimates to provide “additional context” and “translate climate impacts into the more accessible metric of dollars.” Use of SC-GHG in the NEPA context has been contentious.

SC-GHG has been used in various federal rulemakings since 2008 when the 9th Circuit Court of Appeals remanded certain corporate average fuel economy (CAFE) standards for reconsideration because of the failure of the U.S. Department of Transportation to monetize the value of carbon dioxide reductions in setting the appropriate CAFE standards.^[3] Much later, the U.S. Environmental Protection Agency (EPA) prepared dollar estimates of the social costs of carbon in 2016 to accompany the Obama administration’s NEPA guidance.^[4] In this new guidance, the Biden administration recommends federal agencies use the 2016 estimates for SC-GHG (with a slight increase due to inflation) while the estimates are being reevaluated.^[5] The potential social costs now being considered are substantially higher than the adjusted 2016 levels, not surprisingly causing much debate.^[6]

Notably, the guidance also takes a broad view of which “downstream” emissions should be considered indirect effects of an action—stating, for instance, that indirect effects of fossil fuel extraction likely include effects associated with the processing, refining, transporting and end-use of the extracted fuel. The unqualified direction to include such effects in NEPA analysis is in tension with the U.S. Supreme Court’s 2004 *Public Citizen* opinion, which held that agencies need only consider effects that have a “reasonably close causal relationship” to the proposed action (not just a “but-for” causal relationship), and that an agency need not analyze effects it has no authority to prevent.^[7]

In recent years, agencies and the federal courts have struggled to apply the *Public Citizen* standard consistently in the context of downstream emissions, including in cases involving Federal Energy Regulatory Commission approval of natural gas facilities.^[8] Yet the guidance neither mentions *Public Citizen*, nor provides any direction to agencies in identifying which downstream emissions should be considered effects of their action. Compounding this omission, CEQ’s 2022 [amendments](#) to its NEPA regulations also revised the definition of “effects” to eliminate language incorporating the *Public Citizen* standard.^[9] As a result, agencies and project proponents currently have little help in navigating this complex issue and face considerable uncertainty in case of judicial review.

As the Biden administration moves to further engrain climate change impacts into federal decision-making, these and other issues are likely to be the subject of additional litigation, with projects seeking federal authorization caught in the crossfire. Project proponents will need to work proactively with agency staff to minimize legal risks and delays.

The guidance is effective immediately; however, CEQ is accepting comments on the guidance through March 10, 2023.

FOOTNOTES

^[1] *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and*

Climate Change, 88 FR 1196 (January 9, 2023).

^[2] *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 81 FR 51866 (Aug. 5, 2016).

^[3] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008).

^[4] See U.S. Env'tl. Protection Agency, [Fact Sheet: Social Cost of Carbon](#), EPA.gov 1-2 (2016). See also, Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis* (August 2016).

^[5] See Interagency Working Group on Social Cost of Greenhouse Gases, *Social Cost of Carbon, Methane, and Nitrous Oxide, Interim Estimates* (February 2021) and EPA, Docket ID No. EPA-HQ-OAR-2021-0317, *EPA External Review Draft of Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances* (September 2022).

^[6] Ten states have attempted to halt the consideration of SC-GHG in federal rulemaking through litigation. In May, the U.S. Supreme Court denied a motion to vacate a 5th Circuit of Court of Appeals stay of a district court injunction prohibiting the Biden Administration from using the social cost of carbon in its decision-making. *Louisiana et al. v. Biden*, 385 F. Supp. 3d 840 (W.D.La. 2022), *stayed*, No. 22-30019 (5th Cir. 2022), *motion to vacate stay denied*, 596 U.S. ____ (May 26, 2022). Note that the Louisiana District Court cited the “major question” doctrine in issuing its preliminary injunction before the U.S. Supreme Court’s decision in *West Virginia v. EPA*, 488 U.S. 361 (2022). Another twelve states filed a similar challenge to the use of SC-GHG in federal rulemaking but were dismissed in the district court for lack of standing. *Missouri et al. v. Biden*, 558 F. Supp. 3d 754 (E.D.Mo. 2021), *affirmed*, No. 21-3013 (8th Cir. October 21, 2022), *en banc rehearing denied*, No. 21-3013 (8th Cir. January 27, 2023).

^[7] *U.S. Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

^[8] See, e.g., *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017), and cases cited therein.

^[9] 87 FR 23453 (April 20, 2022).

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